Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

LAW OFFICES OF HERBERT HAFIF and GREG K. HAFIF,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the False Claims Act authorized the district court in this action to reallocate settlement proceeds in the sum of $87,152.56 from Petitioner Law Offices of Herbert Hafif to the Respondent United States of America.

2. Whether the Ninth Circuit Court of Appeals' judgment, which affirmed the district court's order reallocating the settlement proceeds, conflicts with Supreme Court precedent, which (a) limits a district court's review of a settlement agreement to either approving or rejecting the settlement and (b) prohibits a district court from modifying the terms of a settlement agreement over the parties' objections.

PARTIES TO THE PROCEEDING

Greg K. Hafif is listed as a Petitioner herein only because he was erroneously listed as a plaintiff-appellant in the caption of the judgment rendered by the United States Court of Appeals for the Ninth Circuit. App., *infra*, at 1a. The real party-in-interest is Petitioner Law Offices of Herbert Hafif, because the Court of Appeals' judgment affirmed the district court's order that plaintiffs-appellants Roland Gibeault and Inge Maudal "and the Law Offices of Herbert Hafif be held jointly and severally liable for the amount owed to the Government." App., *infra*, at 10a. The Law Offices of Herbert Hafif is former counsel of record for Gibeault and Maudal. Greg K. Hafif merely argued before the Court of Appeals on behalf of the Law Offices of Herbert Hafif. The Law Offices of Herbert Hafif will be referred to herein as "the Petitioner." The Law Offices of Herbert Hafif is a professional corporation and has no parent companies or nonwholly-owned subsidiaries.

The Respondent is the United States of America, who was a plaintiff-appellee in the proceedings below. Gibeault and Maudal are interested parties to the determination of this Petition. Defendants Texas Instruments Corporation, Gould Inc., PSI Tronix, Inc., and Aerospatiale Helicopter Corp. are not believed to be interested in the determination of this Petition, but are being served a copy of the Petition in an abundance of caution.

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Petitioner Law Offices of Herbert Hafif respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, at 1a-5a) is reported at 104 F.3d 276. The district court's Order Rejecting 1992 Settlement Agreement; Order Re Structure of New Settlement Agreement (App., *infra*, at 6a-10a) and Order Granting Defendant's Motion to Dismiss; Order Reallocating Proceeds of Defendant's Prior Payment (App., *infra*, at 11a-17a) are unpublished. A prior opinion of the Court of Appeals (App., *infra*, at 18a-24a), which Petitioner contends is the law of this case, is reported at 25 F.3d 725.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on January 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The case arises under and concerns the False Claims Act, 31 U.S.C. §§ 3729-33. The appendix includes 31 U.S.C. § 3730, which is the only relevant portion of the False Claims Act referred to in this Petition. App., *infra*, at 25a-33a.

STATEMENT OF THE CASE

In the underlying action, the *qui tam* plaintiffs Roland Gibeault and Inge Maudal (hereinafter collectively "the relators") were represented by the Petitioner, Law Offices of Herbert Hafif. The relators filed a complaint against *inter alia*,

defendant Texas Instruments Corporation under the False Claims Act, 31 U.S.C. §§ 3729-33 ("the FCA"). The relators alleged that Texas Instruments violated the FCA by misrepresenting tests and inspections of pressure transducers for the HARM missile that Texas Instruments was producing for the United States Navy. The United States declined to intervene in the case. App., at 7a.

The relators and Texas Instruments eventually reached a settlement. The relators agreed to dismiss the case with prejudice as to them and the United States in exchange for the payment of statutory attorney's fees and costs in the sum of $300,000 from Texas Instruments. Pursuant to a retainer agreement, the Petitioner provided Gibeault and Maudal each with a check in the sum of $62,251.83. *Id.* The United States objected to the settlement in the district court. The district court found that the United States could not object as it repeatedly refused to intervene and dismissed the action with prejudice. *Id.*, at 8a.

The United States appealed. The Court of Appeals, holding that the United States had the right to a hearing on its objections upon a showing of "good cause," reversed and remanded the case to the district court. App. at 24a. The Court of Appeals expressly gave the district court two options upon hearing the United States' objections to the settlement: (1) "approve the settlement and dismiss the action" or (2) "reject the settlement and permit the parties to proceed with this *qui tam* action." *Id.*[1]

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1. The prior appeal in this case was decided with the companion case of *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994), *appeal after remand*, 69 F.3d 545 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 296 (1996). In *Killingsworth*, the Court of Appeals gave the district court the same two options upon the United States' objections to a settlement reached there between the *qui tam* plaintiff and defendant Northrop: (1) approve the settlement and dismiss the action or (2) vacate the settlement and allow the parties to continue with the litigation. *Killingsworth*, 25 F.3d at 725.

Upon remand, the district court rejected the settlement because, *inter alia*, the relators had received a portion of the $300,000 payment of statutory attorney's fees and costs. The district found that the payment to the relators constituted a "damages" payment under the FCA, to which the United States claimed a 70% share pursuant to 31 U.S.C. § 3730(d)(2). App., at 15a.[2] The district court ordered the relators and Texas Instruments to structure a new settlement agreement stating that the United States would receive at least 70% of any recovery for the relators. *Id.*, at 17a.

However, the undisputed evidence before the district court showed that the $300,000 payment to the Petitioner was for attorney's fees and costs and not for "civil penalty and damages" under the FCA. The Petitioner showed that this amount was less than the actual amount of attorney's fees rendered on the relators' behalf. Also, Texas Instruments had spent well over $300,000 in attorney's fees defending the action. The claims against Texas Instruments lacked merit because of a prior administrative settlement with the Department of Navy and the adequate performance of the military hardware in question (the HARM Missile). Texas Instruments' expressed its intent that no settlement could be reached if payment was for settlement of the FCA claims.

The parties did not reach a "new" settlement, and Texas Instruments moved to dismiss for lack of prosecution under Rule 41(b) of the Federal Rules of Civil Procedure. The United States

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2. Section 3730(d)(2) states in pertinent part: "If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decided is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds." 31 U.S.C. § 3730(d)(2). *See* App., at 29a-30a.

opposed that motion, but also requested 70% of the $124,503.66 (*i.e.*, $87,152.66), received by the relators. App., at 8a, 10a.

The district court granted Texas Instruments' motion to dismiss, but also ordered reallocation of settlement proceeds. App., at 10a. The district court ordered that the relators and the Petitioner were jointly and severally liable to the United States for $87,152.66. *Id.*

The relators and the Petitioner separately appealed. The Court of Appeals relied on *Killingsworth*, 25 F.3d 715 as the basis for its opinion. The Court of Appeals stated that the "district court is empowered to act to ensure that the government [receives] its proper share of the settlement." App., at 4a (*quoting Killingsworth*, 25 F.3d at 724). The Court of Appeals further stated that the language of the FCA "authoriz[es] the district court to bar a qui tam plaintiff and defendant from artificially structuring a settlement to deny the government its proper share of the proceeds." *Id.* (*quoting Killingsworth*, 25 F.3d at 724). The Court of Appeals then impermissibly extrapolated from such precedent that the district court "had the power to restructure the settlement to secure the government's share." *Id.*, at 5a. The Court of Appeals thus affirmed the district court's judgment, including the reallocation of the settlement proceeds. *Id.*

REASONS FOR GRANTING THE WRIT

Two bases exist to vacate the Court of Appeals' judgment, which affirmed the reallocation of settlement proceeds. First, contrary to the Court of Appeals' judgment, the FCA plainly does not authorize a district court to reallocate settlement proceeds from the relators and their counsel to the United States. The FCA provides a mechanism by which a relator may request a hearing concerning any objection the relator may have to a settlement reached between the United States and the defendant.

See 31 U.S.C. § 3730(c)(2)(B). Although there is no parallel provision providing the United States with the opportunity to object to a settlement between the relators and the defendant, the Court of Appeals in the prior appeal in this case and in *Killingsworth* construed the FCA to allow the United States to be heard on its objection to a settlement upon a showing of good cause. Upon the United States' objection, the district court can either approve the settlement and dismiss the action or vacate the settlement and allow the parties to continue. It is manifest, however, that the FCA does not expressly or impliedly authorize the district court to reallocate the settlement proceeds over the objection of the settling parties.

Second, the Court of Appeals' judgment violates prior Supreme Court precedent, which states that a district court abuses its authority when it modifies a settlement agreement reached between private parties over their objection. Instead, the district court can only approve or reject the settlement presented to it.

I.

THE FALSE CLAIMS ACT DOES NOT AUTHORIZE THE DISTRICT COURT TO REALLOCATE SETTLEMENT PROCEEDS FROM THE RELATORS AND THEIR ATTORNEYS TO THE UNITED STATES.

The Court of Appeals' holding in this case — "As *Killingsworth* made clear, the court had the power to restructure the settlement to secure the government's share" (App., at 5a) — is simply not supported by the FCA.

Contrary to the Court of Appeals' statement, *Killingsworth* never stated that the district court had the power to reallocate settlement proceeds over the objections of the parties. In fact,

Killingsworth made clear that the parties, *including the United States*, agreed that "the district court has *no power* to reallocate settlement proceeds." *Killingsworth*, 25 F.3d at 721 n.3 (emphasis added).

The FCA states only that the relator has the right to be heard concerning any objections he or she may have to a settlement reached between the United States and a defendant sued under the FCA.[3] The Court of Appeals in the *Killingsworth* decision relied upon this statutory provision when it determined that the United States should be afforded the same right to a hearing upon a showing of good cause when it objects to a settlement reached between the relator and the defendant. *Killingsworth*, 25 F.3d at 723-25 ("when the government objects with good cause to a proposed settlement, it has a right to a hearing, as would an objecting relator under § 3730(c)(2)(B)."). The Court of Appeals in the first appeal in this case, and in *Killingsworth*, thus instructed the respective district courts to either approve the settlement and dismiss the action or reject the settlement and allow the parties to continue with the litigation. App., at 24a; *see also Killingsworth*, 25 F.3d at 725.

Thus, the United States' interests under the FCA were preserved in the present case when it was afforded a hearing and the district court vacated the settlement based upon the United States' objections. When the parties did not proceed with the litigation, the district court then dismissed the action with prejudice, including the rights of the United States. However, the unprecedented step of also reallocating a portion of the

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3. "The Government may settle the action with the defendant notwithstanding the objections to the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera." 31 U.S.C. § 3730(c)(2)(B). *See* App., at 26a-27a.

settlement proceeds after the settlement was vacated goes far beyond the boundary of any reasonable interpretation of the FCA.

II.

THE COURT OF APPEALS' JUDGMENT CONTRAVENES SUPREME COURT PRECEDENT, WHICH LIMITS A DISTRICT COURT'S REVIEW OF A SETTLEMENT AGREEMENT TO EITHER APPROVING OR REJECTING THE SETTLEMENT, AND FORBIDS A DISTRICT COURT FROM MODIFYING THE TERMS OF A SETTLEMENT AGREEMENT OVER THE OBJECTION OF THE PARTIES.

The Court of Appeals' judgment contravenes sound, well-established precedent from this Honorable Court which prohibits a district court from modifying the terms of a settlement agreement over the parties' objections.

In *Evans v. Jeff D.*, 475 U.S. 717, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986), a class action settlement included the equitable relief sought by the plaintiffs in exchange for plaintiffs' counsel's waiver of attorney's fees under the Civil Rights Attorneys' Fee Act. The district court permitted the fee waiver and approved the settlement. On appeal, the Ninth Circuit Court of Appeals invalidated the fee waiver, but left the remainder of the settlement intact. This Honorable Court reversed, and reinstated the district court's approval of the settlement, including the fee waiver.

This Honorable Court decided that although Rule 23(e) of the Federal Rules of Civil Procedure gave the district court the power to approve or reject a class action settlement, the rule

does not authorize the court to require the

> *parties to accept a settlement to which they have not agreed. . . . [or] to modify a proposed consent decree and order its acceptance over either party's objections.*

Evans, at 727, 106 S. Ct. at 1537 (citations omitted) (emphasis added).

Instead, the Supreme Court provided the parameters to which the district court must adhere in ruling on the settlement:

> The options available to the district court were essentially the same as those available to respondents: it could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case.

Id. What the district court in *Evans* could not do however, which occurred in the present action, was to modify the settlement agreement over the objections of the parties:

> The District Court could not enforce the settlement on the merits and award attorney's fees anymore than it could, in a situation in which the attorney had negotiated a large fee at the expense of the plaintiff class, preserve the fee award and order greater relief on the merits.

Id.

Likewise, the Court of Appeals for the Ninth Circuit in *Jeff D. v. Andrus*, 899 F.2d 753 (9th Cir. 1989) (*"Andrus"*), adopted the reasoning of *Evans* when it stated:

> However, courts are not permitted to modify settlement terms or in any manner rewrite agreements reached by parties. [citation omitted]. The court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. [citations omitted]. It may only approve or disapprove the proposal.

Andrus, 899 F.2d at 758 (citations omitted).

This clear precedent in both this Honorable Court and the Court of Appeals for the Ninth Circuit establish that the district court's review of a settlement agreement is limited to the option of either approving or rejecting the settlement agreement. The district court lacks the authority to modify the settlement terms.

The Court of Appeals' judgment in the present case that the district court "had the power to restructure the settlement to secure the government's share" clearly contravenes this sound, well-established authority. If not vacated, the Court of Appeals' judgment will set dangerous precedent by authorizing district courts to modify settlements reached between the parties to a *qui tam* action and reallocate settlement proceeds over the parties' objections.

CONCLUSION

Petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 3, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56660

D.C. No. CV-89-06238-JMI

UNITED STATES OF AMERICA, EX REL.,

Appellee,

ROLAND GIBEAULT; INGE MAUDAL; GREG K. HAFIF,

Plaintiffs-Appellants,

v.

TEXAS INSTRUMENTS CORP.; GOULD, INC.; PSI TRONIX, INC.; AEROSPATIALE HELICOPTER CORP.,

Defendants.

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Submitted December 13, 1996*
Pasadena, California

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Appendix A

Filed January 3, 1997

Before: Cynthia Holcomb Hall, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Kozinski

SUMMARY

Civil Litigation and Procedure/Settlements

The court of appeals affirmed the judgment of a district court. The court held that the district court has the power to restructure the settlement of an action under the False Claims Act to secure the government's share of the proceeds.

Appellants Roland Gibeault, Inge Maudal, and Greg Hafif brought an action against Texas Instruments under the False Claims Act; the government declined to intervene. Texas Instruments agreed to settle for $300,000. This amount was labeled legal fees by the parties and paid to plaintiffs' lawyers. The lawyers then turned over $124,500 to the plaintiffs.

The district court, finding that the $124,500 represented proceeds from the False Claims Act action and not legal fees, held the plaintiffs and their attorneys liable for the government's portion of the settlement. Gibeault, Maudal, and Hafif appealed.

[1] The False Claims Act authorizes a private suit against a party that has defrauded the United States. If the suit is successful, the government and the plaintiff divide the proceeds.

[2] The Act authorizes the district court to bar a plaintiff and defendant from artificially structuring a settlement to deny the government its proper share of the settlement proceeds. While the government may not obstruct the settlement and force litigation, it may question the settlement with or without formal intervention.

[3] The district court was not clearly erroneous in finding that the funds turned over by the lawyers to the plaintiffs were proceeds. The court had the power to restructure the settlement to secure the government's share.

[4] Because the lawyers received funds that belonged to the government, they were responsible for turning the money over to its rightful owner. The lawyers could not divest themselves of this responsibility by transferring the funds to the plaintiffs.

COUNSEL

Lucy Eldridge, Douglas N. Letter, United States Department of Justice, Washington, D.C., for plaintiff-appellee United States of America.

Roland Gibeault, Costa Mesa, California, plaintiff-appellant pro se.

Inge Maudal, Simi Valley, California, plaintiff-appellant pro-se.

Greg K. Hafif, Law Offices of Herbert Hafif, Claremont, California, plaintiff-appellant pro se.

William McD Miller, Musick, Peeler & Garrett, Los Angeles, California, for defendants-appellees Texas Instruments Corp., Gould, Inc., PSI Tronix, Inc. and Aerospatiale Helicopter Corp.

Appendix A

OPINION

KOZINSKI, Circuit Judge.

[1] The False Claims Act, 31 U.S.C. § 3729 *et seq.*, authorizes a private suit against a party that has defrauded the United States. If the suit is successful, the government and the plaintiff (or "relator," in the language of the Act) divide the proceeds. 31 U.S.C. § 3730(d). Such suits are known as *qui tam* actions, from the Latin *qui tam pro domino rege quam pro se imposo sequitur,* meaning "he who brings the action for the king as well as for himself."

[2] In *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994), we held that when a False Claims suit is settled rather than adjudicated, the district court is empowered to act "to ensure that the government [receives] its proper share of the settlement." *Id.* at 724. We noted that the language of the Act "authoriz[es] the district court to bar a *qui tam* plaintiff and defendant from artificially structuring a settlement to deny the government its proper share of the settlement proceeds." *Id.* This is so even when the relator conducts the action; "while the government may not obstruct the settlement and force a *qui tam* plaintiff to continue litigation, [it] nevertheless may question the settlement . . . *with or without formal intervention.*" *Id.* (citing 31 U.S.C. § 3730(d)) (emphasis added).

[3] Here, relators brought a *qui tam* action against Texas Instruments (TI); the government declined to intervene.[1]

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1. The government later intervened for purposes of appeal. *See United States v. Texas Instruments Corp.*, 25 F.3d 725 (9th Cir. 1994) (remanding for hearing on government's objections to settlement of this case).

Appendix A

Ultimately TI agreed to settle for $300,000 — an amount labeled legal fees by the parties and paid to the relators' lawyers. The lawyers then turned over $124,500 to the relators. The district court found that the $124,500 represented proceeds of the *qui tam* action, not legal fees. The court therefore held the relators and the attorneys liable for the government's portion. The district court was not clearly erroneous in finding that the funds turned over by the lawyers to the clients were in fact proceeds. As *Killingsworth* made clear, the court had the power to restructure the settlement to secure the government's share.

[4] The law firm that represented the relators challenges the district court's authority to hold it jointly and severally liable with the relators for the government's share. Because the firm received funds that belonged to the government, it was responsible for turning the money over to its rightful owner. It could not divest itself of that responsibility by transferring funds to its clients.

Appellant Inge Maudal argues that the share of the settlement she received as a relator was hers alone to keep. She is mistaken for the reasons we explain above; we decline to consider Maudal's other claims, presented for the first time on appeal.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED OCTOBER 18, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-89-6238 JMI

UNITED STATES OF AMERICA ex rel. ROLAND GIBEAULT and INGE MAUDAL,

Plaintiffs,

v.

TEXAS INSTRUMENTS CORP., et al.,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

ORDER REALLOCATING PROCEEDS OF DEFENDANT'S PRIOR PAYMENT

IT IS HEREBY ORDERED:

Defendant Texas Instruments Incorporated's ("TI") Motion to Dismiss came before this Court for review on October 16, 1995. After careful consideration, the Court hereby GRANTS defendant's motion.

In addition, the Court orders that individuals Roland Gibeault ("Gibeault") and Inge Maudal ("Maudal") and the Law Offices of Herbert Hafif ("Hafif") be held jointly and severally

liable to the United States of America ("Government") for $87,152.56.

BACKGROUND

In October 1989, relators Gibeault and Maudal, two defense industry engineers, filed this *qui tam* action against TI. They alleged that TI defrauded the U.S. Navy by misrepresenting tests and inspections of pressure transducers for the HARM missile. Gibeault and Maudal sought civil damages pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3730.

After a ten month investigation of the charges, the Government informed the relators that it would not intervene. The relators chose to pursue the action on their own, and the parties commenced discovery. In October 1991, TI revealed that it had reached an administrative settlement with the Navy in January 1991. Under the settlement, TI agreed to compensate the Navy for expenses arising from the defective pressure transducer.

The revelation of the administrative settlement induced settlement negotiations between the relators and TI. In December 1991, the parties reached an agreement providing that TI would pay the relators' attorneys $300,000.00 in costs and fees in exchange for a dismissal with prejudice. Relators' counsel, Hafif, shared the $300,000.00 attorney's fees payment with his clients. Each relator received a check for $62,251.83. The Government did not receive any portion of this payment.

The Government still refused to intervene but attempted to raise four objections to the proposed settlement, one of which was that the costs and attorney's fees might really be

compensatory payments to the relators subject to the FCA allocation provision, 31 U.S.C. § 3730(d)(2)

This Court held a hearing in March 1992 and rejected the Government's objections. This Court found that the Government could not object because it had repeatedly refused to intervene. This Court then approved the settlement in 1992 and dismissed the action with prejudice. The Government appealed.

On appeal, the Ninth Circuit held that this Court had to consider the Government's objections and remanded the case for this purpose. *See United States v. Texas Instruments Corp.*, 25 F.3d 725 (9th Cir. 1994). While the Ninth Circuit recognized that the Government could not both withhold its consent to the settlement and refuse to intervene, the court found that the Government was entitled, on a showing of "good cause", to a hearing on its objections. Finding that good cause existed in this case, the Ninth Circuit ordered this Court to consider the Government's objections and then either "approve the settlement and dismiss the action or reject the settlement and permit the parties to proceed with this *qui tam* action." *Id.* at 728.

This Court then rejected the parties' 1992 settlement agreement and invited the parties to submit a new one. The parties have failed to reach a new settlement agreement. No party currently wishes to pursue this action. It appears to be meritless.

DISCUSSION

Allocation of Proceeds

The Government points out that under the FCA, the Government is entitled to at least 70-75% of the recovery in an

action where the Government has declined to intervene and the relator has pursued the action on his own. *See* 31 U.S.C. § 3730(d)(2). The relator may receive 25-30% of the recovery and reasonable costs and attorney's fees. *Id.*

In the Court's order dated June 8, 1995 ("June 8 order"), the Court found that the amounts received by relators Gibeault and Maudal, $62,251.83 each, "was clearly a damages payment." *See* June 8 order, p.5. Further, the Court held that "[t]he parties simply labeled the entire payment 'costs and attorney's fees' to avoid having to share the payment with the Government." *Id.*

In discussing a district court's power to reduce a *qui tam* plaintiff's share of proceeds, the court in *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994), held that the False Claims Act authorizes "the district court to bar a *qui tam* plaintiff and defendant from artificially structuring a settlement to deny the government its proper share of the settlement proceeds." *Id.* at 724. In addition, "the Act grants the district court the power to ensure that the government will receive its proper share of the settlement as provided by statute." *Id.*

In the instant case, while no formal settlement agreement is currently in force, the present posture of the case could hardly be more representative of a settled dispute. Defendant TI has paid a sum of money to the plaintiff relators' attorney, Hafif. Hafif, in turn, distributed monies to his clients. Now, no party wishes to pursue this action.

Pursuant to the *Killingsworth* court's holding, this Court has the power to redistribute "settlement" proceeds. *Id.* Moreover, even though there may be no formal "settlement" in the instant action, the False Claims Act specifically discusses

allocation "of the *proceeds* of the action *or* settlement." 31 U.S.C. § 3730(d)(2) (emphasis added). Thus, it is not implausible that the *Killingsworth* court's rationale regarding settlements is equally applicable to the present action in its current posture.

In sum, the Court orders that individual relators Gibeault and Maudal and the Law Offices of Herbert Hafif be held jointly and severally liable for the amount owed the Government. These parties, and not TI, are held accountable since they were the beneficiaries of TI's previous payment of $300,000.00. The amount to which the Government is entitled is 70% of $124,503.66, which equals $87,152.56.

Dismissal of Action

Federal Rule of Civil Procedure 41(b) provides that an action may be involuntarily dismissed for "failure of the plaintiff to prosecute . . . [after which] a defendant may move for dismissal of an action."

The aforementioned facts and procedural history of this case show that this case is ripe for a dismissal. No party wishes to pursue this concededly meritless action. Accordingly, this Court dismisses the action with prejudice.

IT IS SO ORDERED.

DATED: October 17, 1995.

s/ James M. Ideman
James M. Ideman
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA DATED JUNE 7, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-89-6238 JMI (GHKx)

UNITED STATES OF AMERICA ex rel. ROLAND GIBEAULT and INGE MAUDAL,

Plaintiffs,

v.

TEXAS INSTRUMENTS CORP., et al.,

Defendants.

ORDER REJECTING 1992 SETTLEMENT AGREEMENT

ORDER RE STRUCTURE OF NEW SETTLEMENT AGREEMENT

IT IS HEREBY ORDERED:

On remand, the Ninth Circuit has ordered this Court to consider plaintiff UNITED STATES OF AMERICA's objections to the settlement agreement between relators ROLAND GIBEAULT and INGE MAUDAL and defendant TEXAS INSTRUMENTS CORP. approved by this Court in 1992. *See United States v. Texas Instruments Corp*, 25 F.3d 725, 728 (9th Cir 1994). After careful consideration of these objections, the Court hereby REJECTS the 1992 settlement agreement. The

relators and defendant are ordered to construct a new settlement agreement and file this agreement with the Court by Friday, August 25, 1995.

BACKGROUND

In October 1989, relators Roland Gibeault (hereinafter "Gibeault") and Inge Maudal (hereinafter "Maudal"), two defense industry engineers, filed this *qui tam* action against Texas Instruments (hereinafter "T.I."). They alleged that T.I. defrauded the United States Navy by misrepresenting tests and inspections of pressure transducers for the HARM missile. Gibeault and Maudal sought civil damages pursuant to the False Claims Act (hereinafter "FCA"), 31 U.S.C. § 3730.

After a ten month investigation of the charges, the Government informed the relators that it would not intervene. The relators chose to pursue the action on their own, and the parties commenced discovery. In October 1991, T.I. revealed that it had reached an administrative settlement with the Navy in January 1991. Under the settlement, T.I. agreed to compensate the Navy for expenses arising from the defective pressure transducer.

The revelation of the administrative settlement induced settlement negotiations between the relators and T.I. In December 1991, the parties reached an agreement providing that T.I. would pay the relators' attorneys $300,000 in costs and fees in exchange for a dismissal with prejudice and a stipulation that "any deficiencies [in the transducers] have now been remedied by TI to the satisfaction of the United States Government, in particular the Navy." *See* Stipulation for Order Dismissing Action, entered March 19, 1992, at 2.

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The Government still refused to intervene but attempted to raise four objections to the proposed settlement:

l) that the costs and attorney's fees might actually be compensatory payments to the relators subject to the FCA allocation provision;

2) that the dismissal should be without prejudice;

3) that the dismissal should expressly prohibit T.I. from recouping its fees and expenses by increasing its overhead on government contracts; and

4) that the dismissal should not include the stipulation that the deficiencies were remedied to the Government's satisfaction when the Government never authorized this stipulation.

This Court held a hearing in March 1992 and rejected the Government's objections. The Court found that the Government could not object because it had repeatedly refused to intervene. The Court then approved the settlement and dismissed the action with prejudice. The Government appealed.

In its opinion remanding the case to this Court, the Ninth Circuit held that the Government could intervene for the purposes of appeal. *See Texas Instruments,* 25 F.3d at 727. While the court recognized that the Government could not both withhold its consent to the settlement and refuse to intervene, the court found that the Government was entitled" on a showing of "good cause," to a hearing on its objections. *See id.* at 728. Finding that good cause existed in this case, the court ordered this Court to consider the Government's objections and then either '"approve the settlement and dismiss the action or reject

the settlement and permit the parties to proceed with this *qui tam* action." *Id.*

This Court subsequently ordered the Government to file its objections and authorized the Government to conduct limited discovery to provide a context for these objections. T.I. and the relators filed opposition to these objections.

DISCUSSION

I. *Objection to Settlement Allocation*

The Government points out that under the FCA, the Government is entitled to at-least 70-75% of the recovery in an action where the Government has declined to intervene and the relator has pursued the action on his own. *See* 31 U.S.C. § 3730(d)(2). The relator may receive 25-30% of the recovery and reasonable costs and attorney's fees. *See id.*

The settlement in this case provided that T.I. would pay $300,000 in costs and attorney's fees. The Government contends that this payment, although labeled "costs and attorney's fees," was actually in part a compensatory payment to the relators. The Government provides a copy of T.I.'s check for $300,000 made out to Roland Gibeault and the Law Offices of Herbert Hafif (hereinafter "Hafif"), the relators' counsel. *See* Statement of Objections to the Stipulation for Dismissal, Exh. D. Hafif admits that he deposited the check and subsequently issued checks to the relators for $62,251.83 each. *See* Statement of Objections to the Stipulation for Dismissal, Exh. G. No portion of the settlement was paid to the Government. Thus, the Government contends that the settlement violated the FCA's allocation provision.

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Hafif defends his action by pointing out that his contingency fee agreement with the relators only permitted him to keep 40% of the amount recovered. This argument is meritless. The money was labeled "costs and attorney's fees" and was not considered a lump sum from which compensatory damages and attorney's fees were to be allocated. Therefore, the contingency fee agreement's percentage allocation provision was irrelevant.

T.I. argues that just because a portion of the costs and fees payment ended up in the hands of the relators, it was not converted to a damages payment. The Court disagrees. The portion the relators received was clearly a damages payment. The parties simply labeled the entire payment "costs and attorney's fees" to avoid having to share the payment with the Government. T.I. also contends that rejecting the settlement agreement will hinder future *qui tam* litigation because *qui tam* plaintiffs will be discouraged from pursuing actions that will rack up considerable attorney's fees. This argument is unpersuasive. The Court is only taking issue with the transfer of funds labeled "costs and attorney's fees" to the relators. A relator's counsel may be reimbursed for costs and attorney's fees, and the Government is not entitled to any portion of that amount. Thus, a risk of considerable attorney's fees should not serve as a deterrent to future *qui tam* litigation. These fees can be recouped.

The Court is not persuaded by Hafif and T.I.'s arguments. The Government has proven that the settlement payment labeled as "costs and attorney's fees" ended up in the hands of the relators. Therefore, the Court finds the Government's objection valid.

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II. *Objections to Stipulation and Dismissal With Prejudice*

The Government also objects to the stipulation that the deficiencies had been remedied to the Government's satisfaction and to the dismissal of the action with prejudice. Because the settlement, as structured, does not render the Government a beneficiary, the Government contends that it cannot be bound by the stipulation or the dismissal.

T[illegible] Government correctly points out that it has never stated its position as to T.I.'s efforts to remedy the deficiencies, and thus, the stipulation is completely unauthorized. As the Ninth Circuit noted, the stipulation "appears to be a gratuitous and an unauthorized statement, not binding on the United States." *Texas Instruments,* 25 F.3d at 727 n.3. The relators and T.I. have not rebutted this argument. Therefore, the Court finds the stipulation to be invalid.

Moreover, the Government argues that by dismissing the action with prejudice, the relators have prevented the Government from pursuing this action on its own. T.I. contends that the dismissal was appropriate because even if the parties had not included dismissal in the settlement, the relators would not have pursued the action further, and this Court would probably have dismissed the case for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b). This rule provides for dismissal with prejudice unless otherwise stated.

Furthermore, T I. correctly argues that there is little chance that the Government will pursue this action now because it has been shown to be meritless: The Government has already rejected several opportunities to intervene. There is no evidence that the Government wishes to pursue this action. Therefore,

the Court finds that dismissal with prejudice was and is appropriate.

III. *Objection as to Increased Overhead*

The Government did not raise this objection in the present pleadings. The Court has no basis for finding that T.I. intends to recoup its costs by increasing its overhead on government contracts. Therefore, the Court will not direct the parties to address this concern.

IV. *Conclusion*

In light of the validity of the Government's objections, the Court rejects the settlement agreement. However, because the relators clearly do not wish to litigate this action any further, the Court will order-the relators and T.I. to structure a new settlement agreement. Under this new agreement, the Government shall receive at least 70% of any recovery for the relators. The parties shall not include the unauthorized stipulation in the new settlement agreement. The agreement may provide that the action will be dismissed with prejudice, however. The parties shall file the new settlement agreement with the Court no later than Friday, August 25, 1995.

IT IS SO ORDERED.

DATED: June 7, 1995

s/ James M. Ideman
James M. Ideman
United States District Judge

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 19, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., *Appellant,* ROLAND GIBEAULT; INGE MAUDAL, *Plaintiffs-Appellees,* v. TEXAS INSTRUMENTS CORP., a Delaware corporation, et al., *Defendants-Appellees.*	No. 92-55760 D.C. No. CV-89-6238-JMI OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
June 11, 1993—Pasadena, California

Filed January 19, 1994

Before: James R. Browning, Myron H. Bright* and Thomas Tang, Circuit Judges.

Opinion by Judge Bright

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*Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix D

SUMMARY

Government Law/Public Contracts and Procurement/Civil Litigation and Procedure

The court of appeals vacated a district court order and remanded. The court held that in a *qui tam* action under the False Claims Act, the government may not both withhold its consent to a settlement and refuse to intervene in the action.

Appellees Roland Gibeault and Inge Maudal brought a *qui tam* action against appellee Texas Instruments Corp. (TI), alleging that TI defrauded the United States by making false claims under a contract with the Navy. The government declined to intervene under the False Claims Act.

Gibeault and Maudal reached a settlement agreement with TI, in which TI agreed to pay attorney's fees in exchange for a dismissal with prejudice, and a stipulation that any deficiencies in its products were remedied to the government's satisfaction. The district court ruled that the government lacked standing to object to the settlement if it did not intervene, and dismissed the case with prejudice. The government moved to intervene for purpose of appeal, seeking to challenge the stipulated dismissal. The district court denied the motion.

The government appealed, contending that the district court erred in dismissing the action without the government's consent, and in denying the government the right to intervene on appeal.

[1] Under a controlling Ninth Circuit case, the government was entitled to intervene for the purpose of appeal.

[2] The government could not both withhold its consent to the settlement and refuse to intervene, thus forcing Gibeault and Maudal to continue litigating. Nevertheless, on a showing

of "good cause," the government is entitled to a hearing regarding the settlement.

COUNSEL

Douglas Letter, United States Department of Justice, Washington, D.C., for the appellant.

Greg K. Hafif (argued) and Phillip E. Benson (on the brief), Law Offices of Herbert Hafif, Claremont, California, for the plaintiffs-appellees.

William McD. Miller, III, Musick, Peeler & Garrett, Los Angeles, California, for the defendants-appellees.

OPINION

BRIGHT, Senior Circuit Judge:

In October of 1989, Roland Gibeault and Inge Maudal brought a *qui tam* action against Texas Instruments [T.I.], alleging it defrauded the United States by making false claims under a contract with the United States Navy. Throughout the course of the litigation, the United States declined to intervene under §§ 3730(b)(2) and (c)(3) of the False Claims Act, 31 U.S.C. § 3730 [the Act]. In December of 1992, Gibeault and Maudal reached a settlement agreement with T.I., in which T.I. agreed to pay their counsel $300,000 in exchange for a dismissal with prejudice and a stipulation that any deficiencies in its products were remedied to the government's satisfaction. The Attorney General objected to the settlement, but did not seek to intervene in the action. The district court held a hearing on the settlement. The district court ruled the government lacked standing to object if it did not intervene and then dismissed the case with prejudice. The United States

moved to intervene for purpose of appeal, seeking to challenge the stipulated dismissal. The district court denied the motion. The United States appeals, contending the district court erred in dismissing the action without the consent of the government and in denying the government the right to intervene on appeal. We vacate the dismissal and remand for further proceedings consistent with this opinion.

I.

In the late 1980s, investigators discovered a conspiracy among defense contractors to defraud the United States Navy by misrepresenting tests and inspections of pressure transducers for the HARM missile. The government prosecuted and convicted Genisco Technology Corp. and three Genisco executives for criminal fraud.

In 1988, Roland Gibeault, a former Genisco employee, filed an action under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730, against Genisco and three defense contractors, including T.I., seeking civil damages for the fraud relating to the pressure transducers. As provided by the Act, the complaint remained under seal and the government reviewed the case. The government decided to intervene as to Genisco, and settled for $725,000. Neither the government nor Gibeault served the remaining defendants, and in October of 1989, they were dismissed. The government formally consented to the dismissal.

The same month as the dismissal, Gibeault and Inge Maudal, an engineer for a competitor of T.I., filed a second *qui tam* action, the subject of the instant case, against T.I.[1] The allegations in this action are essentially the same as in the earlier action filed in 1988. After investigating the allegations for ten months, the government informed Gibeault and Maudal it

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[1]The action originally included other named defendants who eventually were voluntarily dismissed from the action.

would not exercise its right under the Act to take over the litigation.

T.I. was served with the complaint in September of 1990. During 1991, the parties engaged in discovery and began discussing the possibility of settlement. In October of 1991, T.I. raised a prior administrative settlement with the Navy, finalized in January of 1991, as an affirmative defense. Separate from the *qui tam* action, and unbeknownst to Gibeault and Maudal, T.I. and the Navy had executed a contract modification in which T.I. agreed to compensate the Navy for expenses resulting from the defective pressure transducers.

In December of 1991, after learning of the administrative settlement, Gibeault and Maudal negotiated a settlement in which T.I. was to pay their attorneys $300,000, in exchange for a dismissal with prejudice and a stipulation that:

> any deficiencies in the [Genisco pressure transducers] or any other portion of the HARM guidance and control system, and resultant impact on HARM missile performance, if any, have now been remedied by T.I. to the satisfaction of the United States Government, in particular the Navy . . . .

(Stipulation for Order Dismissing Action filed Mar. 17, 1992, at 2.)

The government expressed four concerns about the proposed settlement: (1) whether the attorneys' fees were in reality compensatory payments subject to the allocation provision of § 3730(d)(2) of the False Claims Act; (2) whether the dismissal should be without prejudice; (3) whether the dismissal should expressly prohibit T.I. from recouping its fees and expenses as overhead on government contracts; and (4) whether the dismissal should include the stipulation, unauthorized by the government, that states the deficiencies were

remedied to the government's satisfaction. The government, however, still declined to intervene in the action.[2]

The district court held a hearing on March 16, 1992 and ruled that because the government did not seek to intervene in the case, the Attorney General could not object to the stipulated dismissal. On March 17, 1992, the district court dismissed the action with prejudice.

On April 9, 1992, the government filed a motion seeking leave to intervene for purpose of appeal, which the district court denied on May 12, 1992. The government filed this timely appeal.

II.

[1] The government first contends that the district court erred in holding untimely its motion to intervene for purpose of appeal. We resolved this issue in *United States ex rel. Killingsworth v. Northrop Corporation*, ___ F.2d ___ (9th Cir. No. 92-55863, filed Jan. 19, 1994), the companion to this case. There we held the government may intervene for purpose of appeal. Our decision in *Killingsworth* controls this case, and, consequently, the government may intervene here.

III.

The government's substantive contention is that the district court erred in dismissing the action without its consent. The government objects to the settlement on different grounds than in *Killingsworth*. First, the government claims the $300,000 payment for attorneys' fees is really a settlement under the False Claims Act that is structured as attorneys' fees. Such an allocation of the settlement proceeds would con-

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[2]The provision relating to deficiencies quoted in the text on its face appears to be a gratuitous and an unauthorized statement, not binding on the United States. However, we do not decide that issue in this appeal.

travene the requirements of § 3730(d)(2), which guarantees the government a substantial portion of any False Claims Act settlement. Second, the government objects to a dismissal with prejudice to the United States. Third, the government criticizes the proposed settlement because it fails to bar T.I. from passing on the cost of the settlement to the United States through overhead charges on government contracts. Finally, the government objects to the stipulation, which provides that the deficiencies in the pressure transducers have been remedied to its satisfaction.

[2] Following *Killingsworth*, we hold the government may not both withhold its consent to the settlement and refuse to intervene, thus forcing Gibeault and Maudal to continue litigating. Nevertheless, under *Killingsworth*, the government, on a showing of "good cause," is entitled to a hearing before the district court. In this case, the district court rejected the government's objection to the dismissal for lack of standing. Thus, the question of good cause remains.

A hearing, if granted by the district court for good cause shown, need address only the first concern of the government, namely the allocation of settlement proceeds solely to attorneys' fees. To raise the government's other concerns with the settlement before the district court in these proceedings, the government must intervene formally under § 3730(c)(3).

On remand, the district court should review the government's contentions and the responses by relators and the defendant to determine initially whether good cause exists for the hearing, and, if not, reenter a dismissal of the action. Should the trial court find that good cause exists, it should grant an appropriate hearing and either approve the settlement and dismiss the action, or reject the settlement and permit the parties to proceed with this *qui tam* action.

Accordingly, we VACATE the dismissal and REMAND this action for further proceedings consistent with this opinion.

APPENDIX E — RELEVANT STATUTE

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **Actions by private persons.**

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d) (4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed

and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to qui tam actions.**

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the

defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct

the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the

United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) **Award to qui tam plaintiff.**

(l) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is

reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

Appendix E

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101 (f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **Government not liable for certain expenses.** The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) **Fees and expenses to prevailing defendant.** In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Appendix E

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought —

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final . . . .